

**People v Johnson**

2009 NY Slip Op 33430(U)

November 2, 2009

County Court, Albany County


Docket Number: 31-2356

Judge: Stephen W. Herrick

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DA 160-09 

STATE OF NEW YORK  
COUNTY OF ALBANY COUNTY COURT

Albany County Clerk  
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER  
Ind # 31-2356

CHRISTOPHER JOHNSON,  
Defendant.

APPEARANCES

For the People

HONORABLE P. DAVID SOARES  
Albany County District Attorney  
Albany County Judicial Center  
Albany, New York 12207

MARY TANNER-RICHTER  
Assistant District Attorney

For the Defendant

GERSTENZANG, O'HERN, HICKEY  
AND GERSTENZANG  
210 Great Oaks Boulevard  
Albany, New York 12203

ERIC SILLS, ESQ.

HERRICK, J. Defendant is charged in a four count indictment with one count of Assault in the Second Degree, in violation of Penal Law, section 120.05[4], a Class D Felony; one count of Vehicular Assault in the Second Degree, in violation of Penal Law, section 120.03[1], a Class E Felony; one count of Operating a Motor Vehicle While Ability Impaired by the Combined Influence of Drugs or of Alcohol and any Drug or Drugs, in violation of Vehicle

and Traffic Law, section 1192[4][a], a Misdemeanor and one count of Reckless Driving in violation of Vehicle and Traffic Law, section 1212, a Misdemeanor.

Pursuant to section 710.60 of the Criminal Procedure Law, defendant challenges the sufficiency of the probable cause resulting in his arrest and moves to suppress the tangible evidence that the People propose to introduce at trial.

A pre-trial Dunaway-Mapp hearing was held before the Court on October 14, 2009. Testifying for the People were Town of Colonie Police Department Investigators Paul Musser and Jeffrey Lockart and Officer Jason Bach. The defense did not call any witnesses.

Based upon the credible testimony of record, the Court finds the following facts.

#### FINDINGS OF FACT

On September 5, 2008, at approximately 1:11 AM, Town of Colonie Police Department Officer Jason Bach was dispatched to Broderick Street in the Town of Colonie to investigate a reported car crash. Arriving at the scene, Officer Bach observed a 2004 Suburu on fire and crashed into a tree. A male, later identified as the defendant, Christopher Johnson, was behind the wheel, unconscious, and suffering from several, visible broken bones. A female, later identified as the passenger, Adrienne Taylor, was wandering the scene, apparently injured and disoriented.

Additional police and emergency personnel arrived at the scene, including Inspector Jeffrey Lockart, who also observed the defendant behind the wheel of the car. The defendant had to be extricated from the vehicle by the EMT's a procedure in which Officer Bach assisted.

Once removed from the vehicle, the defendant was transported to Albany Medical

Center Hospital by ambulance. Officer Bach followed in a police vehicle. Upon arrival at the hospital, a specific EMT by the name of John, gave a marijuana pipe to Officer Bach, reporting that the pipe had fallen from defendant's pocket while the EMT's were removing defendant's clothing. Officer Bach observed a residue in the pipe, which appeared to him to be burnt marijuana.

Officer Bach accompanied the defendant to the emergency room where hospital personnel began treating his injuries. He remained unconscious.

Meanwhile, Investigator Paul Musser was called at home and dispatched to the hospital to assist in the accident investigation. Shortly after arriving, he spoke with Officer Bach who gave him the marijuana pipe and reported the foregoing events. Investigator Musser, also, observed the burnt residue in the pipe. He also spoke with Investigator Lockart about the accident.

Investigator Musser went into the emergency room where defendant was being treated. He observed the defendant, unconscious and breathing, and detected the odor of alcohol when defendant exhaled. At that point, Investigator Musser placed defendant under arrest. He proceeded to advise defendant of his Miranda rights and gave him DWI warnings. The defendant remained unresponsive. At his request, a sample of defendant's blood was drawn by Nurse Maria Dyer under the direction of the supervising physician, Dr. Ravi Ghandi.

The defendant was subsequently indicted as set forth above.

#### CONCLUSIONS OF LAW

The defendant alleges that the police did not have the requisite probable cause at the time he was arrested. As a result, all subsequent evidence seized is "fruit of the poisonous

tree” requiring suppression.

A police officer may arrest a person for “... (a) crime when he has reasonable cause to believe that such a person has committed (a) crime whether in his presence or otherwise.” Criminal Procedure Law, section 140.10(1)(b). Acting as a prudent person would in believing that an offense has been committed, a police officer is allowed to draw upon the entirety of his or her experience and knowledge as a criminal investigator in determining whether probable cause for arrest exists. People v. Hill 146 AD2d 823 (Third Dept.) lv.den 73 NY2d 1016. The evidence of criminality need not rise to the level necessary to support a criminal conviction or even be sufficient to establish a prima facie case. It need merely appear more probable than not that crime has taken place and that the one arrested is its perpetrator. Id. With regard to alcohol related offenses, the standard is “...whether, viewing the facts and circumstances as they appeared at the time of arrest, a reasonable person in the position of the officer could have concluded that the motorist had operated the vehicle while under the influence of intoxicating liquor.” People v. Rollins 118 AD2d 949 (Third Dept.).

Here, the evidence at the hearing established that, prior to seeing the defendant at the hospital, Investigator Musser learned, from conversations with Investigator Lockart and Officer Bach, that there was an accident where it appeared that the defendant had crashed a car into a tree; that the defendant was unconscious at the scene and that a marijuana pipe fell from defendant’s pocket while he was receiving emergency medical treatment in an ambulance on the way to the hospital.

Investigator Musser, then, saw the still unconscious defendant in the emergency room and detected the odor of alcohol on his breath. The Court finds that the above stated facts

provided Investigator Musser with probable cause for defendant's arrest.

The Court further finds that Investigator Musser's arrest of the defendant was permitted by the "fellow officer rule". The fellow officer rule provides that even if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest will be lawful if the officer, "acts upon the direction of or as a result of communication with ... a fellow officer... provided that the police as a whole were in possession of information sufficient to constitute probable cause to make an arrest." People v. Ramirez-Portoreal 88 NY2d 99, 113. In the present matter, the totality of the information possessed by the police provided probable cause for defendant's arrest.

Turning to the Mapp issues raised regarding the seizure of tangible property, namely the marijuana pipe, the Court notes that at a suppression hearing it is the defendant's burden to establish standing to challenge the seizure by demonstrating a legitimate expectation of privacy in the premises where the property was seized. People v. Wesley 73 NY2d 351. A legitimate expectation of privacy exists where a defendant has manifested an expectation of privacy that society recognizes as reasonable. People v. Ramirez-Portoreal, supra. The Court, therefore, finds that the defendant had a reasonable expectation of privacy with regard to his person.

However, defendant's motion to suppress the pipe that is denied, it being seized under the plain view exception to the warrant requirement. People v. Diaz 81 NY2d 106. The EMT's were lawfully in a position from where the pipe was viewed, they had lawful access to the pipe and the incriminating nature of the pipe was readily apparent. Id. Defendant's motion to suppress the evidence seized, is, therefore, denied

Based upon the foregoing, the defendant's motion to suppress is, in all respects denied.

The Court has considered defendant's remaining arguments and finds them to be without merit.

Jury selection in this case will commence at 10:00 AM on January 4, 2010 at the Albany County Judicial Center.

This memorandum shall constitute the Decision and Order of the Court.

DATED: Albany, New York  
November 2, 2009

  
STEPHEN W. HERRICK, JCC  
11/5/09 sa.

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